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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-6149

JOSEPH W. SCHEER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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No. 79-6149

JOSEPH W. SCHEER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on January 31, 1980.

CITATIONS TO OPINIONS BELOW

The judgment order of the Court of Appeals is not yet reported and is reprinted in Appendix A, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1980. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

QUESTION PRESENTED

Does the double jeopardy clause of the Fifth Amendment to the United States Constitution require the prosecutor to bring, in a single proceeding, all known charges against a defendant arising from a single criminal episode?

STATEMENT OF THE CASE

This appeal results from the district court's denial of Petitioner's Motion to Dismiss his indictment on the basis of double jeopardy. A written Stipulation of facts (see Appendix B) was filed prior to the hearing on the motion, and it, along with one additional oral stipulation (6a)[1], was the factual foundation upon which the motion was premised.

The pertinent facts may be summarized as follows. On June 18, 1978, Petitioner was arrested and charged with possession of approximately 2,000 grams of cocaine with the

[1]All references are to the transcript of the hearing on Petitioner's Motion to Dismiss. See Appendix C.

intent to distribute in violation of 21 USC §841(a)(1). On that date, he was interviewed by three DEA agents and admitted that on June 6, 1978, he went to South America with approximately $20,000.00 and purchased the cocaine. He further admitted that he purchased the cocaine for distribution.

On July 21, 1978, Petitioner was indicted in the United States District Court for the Western District of Pennsylvania at Criminal No. 78-174, upon a single count of possession of cocaine with the intent to distribute, in violation of 21 USC §841(a)(1).

On November 13, 1978, Petitioner entered a conditional guilty plea, reserving his right to appeal the court's denial of his Motion to Suppress Evidence. He was thereafter sentenced on January 9, 1979 to a term of imprisonment of three and one-half years, to be followed by a three-year special parole term.

On January 10, 1979, Petitioner appealed his conviction to the United States Court of Appeals for the Third Circuit, where it was affirmed on June 19, 1979. United States v. Scheer, 600 F.2d 5.

The present indictment was filed on March 9, 1979. It charged Petitioner, in two counts, with the exportation of monetary instruments from the United States in excess of $10,000.00 without the filing of required reports, in violation of 31 USC §1101. The basis of the indictment was Petitioner's

taking of the currency to South America for the purchase of the cocaine which was the subject matter of the first indictment.

Even though the first indictment and the present indictment were drafted and presented to the grand jury by different assistant United States attorneys, the court below found "the assistant United States attorney, who brought the first indictment, knew of the currency violation at the time the first indictment was filed." (16a) In fact, the government stipulated that sometime in the fall of 1978, the prosecutors handling the two cases discussed the possibility of consolidating them (6a).

The government further stipulated (see Appendix B):

> "8. That the charges contained in the instant indictment and in the indictment at No. 78-174 arise out of a single occurrence, episode or transaction.
>
> "9. That, prior to the filing of the indictment at Cr. No. 78-174, the government had knowledge of all of the facts upon which the instant indictment was founded."

Subsequent to the return of the instant indictment, Petitioner filed a Motion to Dismiss. The hearing on the motion was conducted on April 27, 1979 (see Appendix C). On May 4, 1979, the court filed a Memorandum and Order dismissing the motion (see Appendix D).

REASONS FOR GRANTING THE WRIT

Petitioner contends here as he did in the courts below, that the double jeopardy clause of the Fifth Amendment to the United States Constitution requires the prosecutor to bring, in a single proceeding, all known charges against a defendant arising from a single criminal episode.

Even though the government stipulated (see Appendix B) that the charges contained in both indictments arose out of a single occurrence, episode or transaction, and that it had knowledge of all of the facts upon which the second indictment was founded prior to the filing of the first indictment, the courts below rejected Petitioner's double jeopardy claim in reliance upon the "same evidence" test. The "same evidence" test, however, severely limits the double jeopardy clause's prohibition against multiple prosecutions and is therefore unacceptable. The time has come for this Court to discard the "same evidence" test in favor of the "same transaction" test.

It has long been the law that the double jeopardy clause is a guarantee "that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity...." Green v. U.S., 355 U.S. 184, 187, 2 L.Ed.2d 199, 204, 78 S. Ct. 221 (1957).

This guarantee is expressed as a prohibition against multi-prosecutions for the "same offense". Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S. Ct. 1189 (1970).

In determining whether a second prosecution is permissible, some courts have applied the "same evidence" test. Other courts have rejected that test in favor of the "same transaction" test.

Under the "same evidence" test, the double jeopardy clause would not be a bar to the present prosecution. However, under the "same transaction" test, the double jeopardy clause is a bar to this prosecution since the present offense and the former offense both arise out of the "same transaction". See, Model Penal Code, §1.07(2) (proposed draft, 1962), which states:

> "A defendant shall not be subjected to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial...." (Emphasis added)

"Episode" is defined as "an occurrence or connected series of occurrences and developments which may be viewed as distinct and apart although part of a larger or more comprehensive series." ABA Standards Relating to Joinder and Severance, §1.3(a) (Commentary). The Commentary further states:

> "It is the view of the Advisory Committee that, except where the ends of justice would otherwise be defeated, the defendant should not be subjected to multiple trials of related offenses...."

In Ashe v. Swenson, supra, the issue before the Court was whether collateral estoppel was part of the double jeopardy clause. Three concurring justices, however, expressed their view that the double jeopardy clause requires "the prosecution ...to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction." 397 U.S. at 453-454.

The concurring opinion significantly observed:

> "The 'same evidence' test is not constitutionally required. It was first expounded after the adoption of the Fifth Amendment, and, as shown in Abbate v. U.S., supra, at 197-198, 3 L.Ed.2d 735, 736, n.2, has never been squarely held by this Court to be the required construction of the constitutional phrase 'same offence' in a case involving multiple trials; indeed, in that context it has been rejected. See, In re: Nielson, 131, 176, 33 L.Ed. 118, 9 S. Ct. 672 (1889),..." 397 U.S. at 452-453. (Emphasis added)

The deficiencies of the "same evidence" test were catalogued in the concurring opinion:

> "It (the same evidence test) does not enforce, but virtually annuls the constitutional guarantee. For example, where a single criminal episode involves several victims, under the 'same evidence' test, a separate prosecution may be brought as to each. (cit. om.) The 'same evidence' test permits multiple prosecutions where a single transaction is divisible into chronologically discreet crimes. (cit. om.) Even a single act may lead to multiple prosecutions if it is viewed from the perspective of different statutes. (cit. om.) Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable." Ashe v. Swenson, 397 U.S. at 451-452.

Here, the charges contained in both indictments clearly arise out of the same criminal "episode".[2] They are "an occurrence or connected series of occurrences and developments which may be viewed as distinct and apart although part of a larger, more comprehensive series." ABA Standards Relating to Joinder and Severance, §1.3(a) (Commentary).

On June 6, 1978, Petitioner went to South America with approximately $20,000.00 in United States currency (the subject matter of the present indictment) and used that money

---

[2]This was conceded by the government in Paragraph 8 of the Stipulation. (See Appendix B)

to purchase approximately 2,000 grams of cocaine (the subject matter of the first indictment). While the taking of the currency to South America and the purchase of the cocaine may be viewed as distinct and apart, it is obvious that they are directly connected acts which were [illegible] ve series [illegible] ir-

BEST COPY AVAILABLE

This case is a clear example of the shortcomings of the "same evidence" test and its inadequacy to protect the rights guaranteed by the double jeopardy clause. Petitioner is being forced to "run the gauntlet" twice for offenses arising out of a single criminal episode. Moreover, the spectre of further prosecutions will haunt the Petitioner until the statute of limitations has run on all conceivable offenses.

On the other hand, the "same transaction" test, requiring the consolidation in one lawsuit of all issues arising out a single transction or occurrence, gives broadest enforcement to the double jeopardy clause's prohibition against multiple prosecutions and best promotes justice, economy and convenience.

CONCLUSION

It is respectfully submitted that certiorari should be granted to overrule the "same evidence" test in favor of the "same transaction" test. Petitioner has been twice indicted for offenses arising out of a single criminal transaction. We urge this Court to dismiss the present indictment as violative of Petitioner's guarantee against double jeopardy. Having "run the gauntlet" once, Petitioner is now entitled to the security and peace of mind that the double jeopardy clause was designed to protect.

Stanton D. Levenson, Esquire

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1679

UNITED STATES OF AMERICA,
Appellee,

v.

SCHEER, JOSEPH W.,
Appellant.

Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Criminal No. 79-00039

Submitted Under Third Circuit Rule 12(6)
January 17, 1980

Before: HUNTER, HIGGINBOTHAM, and SLOVITER, Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred in denying appellant's motion to dismiss based upon the allegation that jeopardy had attached in appellant's previous narcotics trial.

It is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ James Hunter III
Circuit Judge

Attest:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: January 31, 1980

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Cr. No. 78-39
	)	
JOSEPH M. SCHEER	)	

STIPULATION

For purposes of the hearing on Defendant's Motion to Dismiss Indictment, the Defendant, by his attorney, Stanton D. Levenson, Esquire, and the United States, by Assistant United States Attorney Thomas A. Crawford, hereby stipulate as follows:

1. That on June 18, 1978, the Defendant was arrested upon a charge of possession of approximately 2000 grams of cocaine with the intent to distribute, in violation of 21 USC §841(a)(1).

2. That on June 18, 1978, the Defendant was interviewed by DEA Agents Schmotzer, Carroll and Ramsey and admitted that on or about June 6, 1978, he went to South America with approximately $20,[illegible].00 with which he purchased and brought back to the United States approximately 2000 grams of cocaine which he intended to distribute in the Beaver Valley area.

3. That on July 21, 1978, the Defendant was indicted in the United States District Court for the Western District of Pennsylvania at Cr. No. 78-174, upon a charge of possession of approximately 2000 grams of cocaine with the intent to distribute in violation of 21 USC §841(a)(1).

4. That on November 13, 1978, the Defendant entered a conditional guilty plea to the indictment at Cr. No. 78-174.

5. That on January 9, 1979, the Defendant was sentenced at Cr. No. 78-174 to a term of imprisonment of 3-1/2 years, to be followed by a 3-year special parole term.

6. That on January 10, 1979, the Defendant appealed his conviction to the United States Court of Appeals for the Third Circuit, where it is presently pending at No. 79-1109.

7. That the instant indictment was filed on March 9, 1979.

8. That the charges contained in the instant indictment and in the indictment at No. 78-174 arise out of a single occurrence, episode or transaction.

9. That, prior to the filing of the indictment at Cr. No. 78-174, the government had knowledge of all of the facts upon which the instant indictment was founded.

10. That David Atkins, Esquire, was the Assistant United States Attorney who drafted and presented the indictment at No. 78-174 to the grand jury. The case was thereafter prosecuted by Assistant United States Attorney Bruce Antkowiak.

11. That Thomas A. Crawford, Esquire, was the Assistant United States Attorney who drafted and presented the instant indictment to the grand jury.

~~12. That prior to July 21, 1978, Assistant United States Attorneys Atkins and Crawford discussed this case. Crawford advised Atkins to include the present charges in the indictment at No. 78-174. Atkins, however, declined to do so.~~

13. That sometime prior to March 9, 1979, Assistant United States Attorney Atkins transferred to the United States Attorney's Office in Chicago.

T. A.C.
Thomas A. Crawford, Esquire
Assistant U.S. Attorney

S.D.L.
Stanton D. Levenson, Esquire
Attorney for Defendant

2.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

----------X

United States of America,

vs. Criminal Action

JOSEPH W. SCHEER, No. 79-39

Defendant.

----------X

P R O C E E D I N G S

Hearing on Motion held on April 27, 1979, 4:30PM, United States District Court, Pittsburgh, Pennsylvania, before the Honorable Barron P. McCune.

APPEARANCES:

On behalf of the Government:

Thomas Crawford, Asst. U. S. Attorney

On behalf of the Defendant:

Stanton D. Levenson, Esquire

Jordan Lilienthal
Official Reporter.

FORM 801-228 REPORTERS PAPER & MFG. CO. 800-626-6313

THE COURT: All right, gentlemen, I will hear you on this matter. I don't think it will take very long to argue because I will have to read your cases anyhow.

Mr. Levenson, it is your motion.

MR. LEVENSON: Yes. Thank you, your Honor. We have a stipulation of facts that I will hand up to your Honor, and we have agreed on one oral inclusion in the stipulation of facts. It is contained in the government's brief, which I was handed this afternoon. That is that sometime in the fall of 1978, the prosecutors handling the two cases discussed the possibilities of consolidating the cases. That would be Mr. Crawford handling this case and Mr. Atkins handlir the first indictment.

I believe that is the only addition we have.

MR. CRAWFORD: That is correct.

MR. LEVENSON: All right. Your Honor, I have filed this motion to dismiss the indictment based on two different grounds, propositions. The first is that the double jeopardy clause requires the prosecutor to bring in a single indictment all known charges against a defendant arising out of a single criminal episode.

In my brief I cite the case of Ash vs. Swenson, U. S. Supreme Court decision, for the proposition that the double jeopardy clause prohibits multiple prosecutions for the same offense. It is our contention that the first indictment

both charge the same offense, and, therefore, the double jeopardy clause requires that this present indictment be dismissed.

Now, the question that arises in this proceeding your Honor, is how do we determine what is the same offense for purposes of double jeopardy? There have been two tests which have been employed by the Courts. One is referred to as the same evidence test and the other is the same transacti test.

Under the same evidence test, and I should point out further that the U. S. Supreme Court has never squarely ruled on which of the two tests is the proper one. In the Ash vs. Swenson case, the three concurring Justices stated that in their opinion the same transaction test should be the test constitutionally required, but there has been no definitive ruling by the Supreme Court as of this date.

Under the same evidence test, this particular prosection would not be barred since the government has to use different evidence to prove this Customs currency violatio However, under the same transaction test, double jeopardy would bar this prosectuion because the prosectuion had knowledge of this transaction and of these crimes during the time that he was prosecuting the first indictment.

As I have cited in my brief, "episode" has been defined as an occurrence or connected series of occurrences

and developments which may be viewed as distinct and apart, although part of a larger or more comprehensive series. I note from the government's brief that there doesn't really appear to be any argument that these offenses arise out of the same transaction episode or occurrence. So the question before the Court as to the first ground for the motion to dismiss is whether or not to apply the same transaction or the same evidence test. We submit that the same transaction test should be applied. I think that this case presents an extremely clear example of the obvious deficencies of the same test.

Now, the Court may remember that in this case Mr. Scheer left the United States with approximately twenty thousand dollars in U. S. Currency. He travelled to Bogota, Colombia, in South America, and he purchased twenty thousand dollars worth of cocaine which he illegally smuggled into the United States through a Customs entry point in New York City.

The first indictment charged Mr. Scheer with the possession of the cocaine with the intent to distribute. Mr. Scheer had given a statement on the date of his arrest acknowledged he had taken this money out of the country; had purchased the cocaine; had brought it in through New York illegally and did intend to distribute it in the Beaver Valley area.

After the first prosecution was terminated and, in fact, while it was pending on appeal, and it is still pending on appeal, the government then filed these Customs currency charges. Now, as I say, under the same evidence test, that would not be improper. However, following this to its logical or illogical conclusion, if it is proper for the government to now indict Mr. Scheer for the Customs currency violations, then I can see no reason why the government wouldn't be permitted to indict Mr. Scheer at some time in the future but within the statute of limitations for illegally smuggling the drugs into the country. Then I see no reason why the government couldn't prosecute him a fourth time in a fourth indictment for conspiracy.

I think it is clear that all four of those charges would properly be under the admitted facts of this case. And if this Court would rule that the same evidence was the test to be employed, then I submit there would be no bar to the government bringing two more indictments for the charges that I have enumerated.

The same transaction test, however, would require that all of the charges known to the government at the time of the first prosecution would have to be brought in the first prosecution or would be barred by double jeopardy.

I have cited extensively the concurring opinion in Ash vs. Swenson for some of the historical reasons why the

same transaction test should be applied, and I will not refer to that since the Court can get that out of the brief. Therefore, I ask the Court to apply the same transaction test and to dismiss the indictment.

Now, the second prong of the motion is that where the government has knowledge of two or more crimes arising out of a single criminal episode, that it constitutes harassment, prosecutorial overreaching and a violation of due process for the government to divide the charges into separate indictments and make the defendant stand trial two or more times for offenses which could have been clearly brought in one indictment.

I certainly am frank to admit there are no cases directly on this point and the closest I can come by way of analogy was the case of U. S. vs. DeMarco, which I have cited in my brief. I cite that case for the proposition that the courts are to be concerned with the appearance of vindictiveness as well as actual vindictiveness.

The Supreme Court has already ruled that a prosecution motivated by vindictiveness is a proper one for dismissal under the due process clause. DeMarco says that the Courts are also concerned with the appearance of vindictiveness. I submit to the Court that in this case we have what appears to be vindictiveness because of the fact that so clearly the government could have joined in the first prosecution the charges that it has now filed.

In fact, we know from the stipulation that Mr. Crawford and Mr. Atkins did discuss joining the charges in the first prosecution. And, I think it was Mr. Crawford's suggestion and Mr. Atkins declined to do so. So we feel that there is also a due process violation, and I would ask th Court for that reason also to dismiss the indictment.

THE COURT: All right, Mr. Crawford.

MR. CRAWFORD: Your Honor, the defense in this case argues that these are the same transactions. The government would dispute that factually. The count or the counts in this case charge Mr. Scheer with exporting twenty thousand dollars in currency without reporting it; a Customs violation, in order to purchase and import some cocaine.

The charge for which he has been convicted was the actual possession of what appears to be the same cocaine, at a point two weeks later after the export of the cocaine.

Now, while these are part of a series of related matters, and there is no doubt that they are. I am not trying to say they aren't. They are certainly not the same crime, not the same transaction, and are not supported by the same evidence or not entirely the same evidence. Although, there would certainly be certain elements of evidence that would be common.

The majority decision in Ash vs. Swenson, which is cited in both of the briefs, basically holds that the same

evidence test is still the test in Federal Court. Now, it doesn't say so in so many words, but as noted by Mr. Levenson, the concurring opinions really differ from the majority on that point. The concurring opinions wish to apply a new test which is the same transaction test as opposed to the old test, the same evidence test.

Be that as it may, these two cases are still sufficiently different not to be barred by the same transaction test. They are just different cases and one of them just happens to involve the export of the money which was used to buy the cocaine, which was later imported into the country. Something that has not yet been charged, if it ever is, and I suppose it could be. Although, it is much closer in time to the matter which Mr. Scheer has been convicted of, and that is the possession of the drugs.

In other words, the government's position is that the same evidence test is the present test employed by the Courts of Appeals and by the Supreme Court, and even if the Pennsylvania test applied by the Supreme Court of the Commonwealth of Pennsylvania were binding upon this Court, it still would not bar prosecution because this is clearly factually distinguishable from those matters.

This is a situation that you are talking about one crime that occurred almost two weeks before the other crime and is related more as a matter of getting the money

out in order to buy the drugs which were later brought in and then possessed. So, I don't think there is any problem there, from a legal standpoint with continuing with the prosecution in this case.

Now, in regard to the due process argument put forth, which is a rather novel one. It has not been decided in this particular type of circumstance, but there is apparantly a claim on the part of the defendant, and it is also unsupported by any evidence that there is a vindictiveness or appearance of vindictiveness. I see no such evidence in the stipulation, in anything alleged by counsel or by the defendant, and I really think that is a ludicrous ground..

There is no vindictiveness in it. The government has not been screaming for this gentleman's body. As a matter of fact, the record will reflect the government didn't even object to his continuing on the bond that he is currently on. We didn't go out and arrest this gentleman or anything. None of the indicia of harrasment are present in this case and that is apparent on the record. So, I don't think that this case is barred by either a jeopardy consideration or by due process considerations. They are clearly just different crimes committed in order to achieve a particular objective, which neither of the crimes was the objective.

Now, the objective was obviously to sell the dope and get some money here in this country. But it was

short-circuited by the agents who seized the dope and arrested the defendant. That is all."

THE COURT: All right, gentlemen, I will read the cases.

- - -

CERTIFICATE

I, Jordan Lilienthal, Official Reporter, do hereby certify that the foregoing transcript is true and correct.

JORDAN LILIENTHAL
OFFICIAL REPORTER

Pittsburgh, Pennsylvania

June 5, 1979

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	Criminal Action No. 79-39
JOSEPH W. SCHEER	:	

MEMORANDUM

BARRON P. McCUNE, District Judge
May 4, 1979.

Defendant, Joseph Scheer, has moved to dismiss the within indictment on the grounds that it places him twice in jeopardy of prosecution for the same crime. He also raises related due process arguments concerning prosecutorial conduct. After consideration of the briefs and oral arguments, we find neither argument to be meritorious, and deny defendant's motion.

The parties have stipulated to the relevant facts. On or about June 6, 1978, defendant left the United States, taking with him $20,000.00. He used the money to purchase 2,000 grams of cocaine in South America. He returned to the United States with the drug. On July 18, 1978, defendant was interviewed by DEA agents, and on July 21, 1978, was indicted at Criminal Docket No. 78-174 for possession of cocaine. He entered a plea of guilty and was subsequently sentenced on January 9, 1979. Defendant's plea reserved the right to appeal our ruling refusing to suppress evidence.

On March 9, 1979, the within indictment was filed. This second indictment charges defendant with violation of 31 U.S.C. §1101, which proscribes the exportation of monetary instruments from the United States in excess of $10,000.00 without the filing of required reports. The taking of the currency to South

America to purchase the cocaine without filing the reports is the violation underlying the second indictment. The Assistant United States Attorney, who brought the first indictment, knew of the currency violation at the time the first indictment was filed.

The burden of proving double jeopardy rests upon the defendant. U.S. v. Wilson, 32 U.S. 159 (1833). For double jeopardy to attach, the offense involved in both actions must be the same. U.S. v. Ewell, 383 U.S. 116 (1966). The determination of whether two offenses are the same rests upon whether the evidence required to support conviction on one of the indictments would have been sufficient to warrant conviction on the other. Gore v. U.S. 357 U.S. 386 (1958).

The evidence necessary for conviction on the currency violation indictment is not the same as that necessary to convict defendant for possession of cocaine. There is very little evidence which would be needed or used to prove exportation of the funds, absent the reports, that would also be useful in making a case for possession. The same evidence test is thus far from satisfied.

Defendant's counsel, while recognizing the "same evidence" test, urged us to apply instead the "same transaction" test. See U.S. v. Ewell, 383 U.S. 116, 125 (1966) (Brennan concurrence). This test (same transaction) is not the test adopted by the Supreme Court. It appears in no majority opinion, although it has been strenuously defended by Justice Brennan. Because the Supreme Court has consistently rejected the "same transaction test," it is not proper to consider its application here.

Defendant argues that the second indictment is violative of his due process rights because it appears to be vindictive prosecution. Defendant cites little authority for this proposition, and we do not accept his argument. We do not recognize an

independent due process argument in view of the fact that defendant's double jeopardy rights encompass a protection against prosecutorial vindictiveness in bringing multiple indictments. We find no vindictiveness on the part of the United States Attorne however, and thus find that defendant has not been placed in doubl jeopardy.

An order follows.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

Dated: May 4, 1979.

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Criminal Action No. 79-39
	:	
JOSEPH W. SCHEER	:	

ORDER

AND NOW, May 4, 1979, the defendant's Motion to Dismiss is denied.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

cc: Thomas A. Crawford, A.U.S.A.
United States Courthouse
Pittsburgh, Pa. 15219

Stanton D. Levenson, Esq.
1615 Frick Building
Pittsburgh, Pa. 15219